

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-IA-00859-SCT

MISSISSIPPI STATE VETERANS AFFAIRS BOARD APPELLANT/DEFENDANT

VS.

BEVERLY PETTIGREW KRAFT, PERSONAL
REPRESENTATIVE OF THE WRONGFUL DEATH
BENEFICIARIES AND HEIRS AT LAW OF BILLY L.
PETTIGREW, DECEASED; AND INDIVIDUALLY AS
THE DAUGHTER AND AN HEIR AT LAW OF
BILLY L. PETTIGREW, DECEASED; AND THE
ESTATE OF BILLY L. PETTIGREW, BY AND
THROUGH BEVERLY PETTIGREW KRAFT,
ADMINISTRATRIX OF THE ESTATE

APPELLEE/PLAINTIFF

APPELLANT'S REPLY BRIEF

Senith C. Tipton (MSB No. [REDACTED])
Faye Murphree James (MSB No. [REDACTED])
Melanie H. Morano (MSB No. [REDACTED])
Wilkins, Stephens & Tipton, P.A.
One LeFleur's Square, Suite 108
4735 Old Canton Road [39211]
P. O. Box 13429
Jackson, MS 39236-3429
Telephone: (601) 366-4343
Facsimile: (601) 981-7608

STATEMENT OF THE ISSUES

- A. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the statute of limitations had expired when the notice of claim and complaint were filed.
- B. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the plaintiff failed to attach the required expert certificate of consultation to the complaint when it was filed.
- C. Whether the Hinds County Circuit Court erred in denying MSVAB's motion for summary judgment, as a matter of law, because the plaintiff failed to establish even a *prima facie* case of vicarious liability on the part of the defendant MSVAB for alleged negligence of the nursing home caregivers who were not employed by MSVAB, but rather by an independent contractor management company which is not a defendant in this lawsuit.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
(1) Breach of the applicable one-year statute of limitations under <i>Miss. Code Ann.</i> § 11-46-11.	2
(2) Lack of compliance with the mandatory certificate of expert consultation under <i>Miss. Code Ann.</i> § 11-1-58.	3
(3) Defendant's lack of vicarious liability for the actions of employees of the independent contractor management company responsible for the care rendered to Billy Pettigrew during his residency at the nursing home.	4
ARGUMENT	5
A. The Circuit Court incorrectly denied defendant's motion for summary judgment based on the statute of limitations.	6
1. Plaintiff's notice of claim pursuant to the MTCA was untimely served and plaintiff's complaint was untimely filed.	6
2. The discovery rule is not applicable to this case.	10
3. The statute of limitations is not tolled by the alleged disability of the decedent.	11

B.	Plaintiff's suit should be dismissed with prejudice for failure to attach the certificate of expert consultation.	14
1.	<i>Miss. Code Ann.</i> § 11-1-58 was in effect at the time that plaintiff commenced this claim.	14
2.	Defendant did not waive this defense.	15
3.	Dismissal without prejudice is appropriate.	16
C.	The Mississippi State Veterans Affairs Board was improperly sued as a party in this action.	16
1.	MSVAB was not responsible for the actions of its independent contractor's employees.	16
2.	MSVAB did not have control of the day-to-day operations of the nursing home.	18
3.	MSVAB Has Not Waived This Defense and is Not Estopped From Raising This Issue.	22
CONCLUSION		25
CERTIFICATE OF SERVICE		26

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Arceo v. Tolliver</i> , 959 So. 2d 691, 694 (Miss. 2006)	9
<i>Caves v. Yarbrough</i> , WL 3197504, ¶ 22 (Miss. November 1, 2007)	9, 10, 11
<i>May v. Pulmosan Safety Equipment Corporation</i> , 948 So. 2d 483 (Miss. Ct. App. 2007)	7, 8
<i>Patello v. GPCH-GP, Inc.</i> , 933 So. 2d 927, 929 (Miss. 2006)	9
<i>Pounds v. Mississippi Department of Health</i> , 946 So. 2d 413 (Miss. Ct. App. 2006)	8, 9
<i>United States Fidelity and Guaranty Company v. Conservatorship of Melson</i> , 809 So. 2d 647, ¶ 27 (Miss. 2002)	13
<i>University of Mississippi Medical Center v. Easterling</i> , 928 So. 2d 815, 820 (Miss. 2006)	9
<i>University of Mississippi Medical Center v. Robinson</i> , 876 So.2d 337, ¶ 19 (Miss. 2004)	12
<i>Walker v. Whitfield Nursing Center, Inc.</i> , 931 So. 2d 853, 583, 590 (Miss. 2006)	8, 9, 15, 15
<i>Watts v. Tsang</i> , 828 So. 2d 785 (Miss. 2002)	20
<i>Wells v. Radiator Specialty Co.</i> , 413 F. Supp. 2d 778, 782 (S.D. Miss. 2006)	7
<i>Williams v. Lee County Sheriff's Department</i> , 744 So. 2d 286, 291 (Miss. 1991)	20, 21
<u>OTHER STATUTES</u>	
<i>Miss. Code Ann. § 11-1-58</i>	1, 3, 14, 15, 16
<i>Miss. Code Ann. § 11-46-1(f)</i>	20
<i>Miss. Code Ann. § 11-46-5(1)</i>	20

<i>Miss. Code Ann. § 11-46-7(2)</i>	20
<i>Miss. Code Ann. § 11-46-9</i>	4, 20, 21
<i>Miss. Code Ann. § 11-46-9(1)</i>	21
<i>Miss. Code Ann. § 11-46-9(1)(a)</i>	21
<i>Miss. Code Ann. § 11-46-9(1)(d)</i>	21
<i>Miss. Code Ann. § 11-46-9(1)(e)</i>	21
<i>Miss. Code Ann. § 11-46-9(1)(g)</i>	22
<i>Miss. Code Ann. § 11-46-9(1)(r)</i>	22
<i>Miss. Code Ann. § 11-46-11</i>	1, 2, 6, 9, 10
<i>Miss. Code Ann. § 11-46-11(3)</i>	7
<i>Miss. Code Ann. § 11-46-11(4)</i>	12, 13
<i>Miss. Code Ann. § 15-1-36</i>	13
<i>Miss. Code Ann. § 15-1-53</i>	13, 14
<i>Miss. Code Ann. § 15-1-55</i>	13
<i>Miss. Code Ann. § 35-1-1</i>	16
<i>Miss. Code Ann. § 35-1-7</i>	17
<i>Miss. Code Ann. § 35-1-19 through § 35-1-29</i>	17
<i>Miss. Code Ann. § 41-41-211</i>	14
<i>Miss. Code Ann. § 41-41-211(6)</i>	13
<i>Miss. R. Civ. P. 3(a)</i>	15
<i>Miss. R. Civ. P. 56</i>	21

STATEMENT OF THE CASE

Defendant Mississippi Veteran's Affairs Board filed motions for summary judgment on three separate grounds: (1) a breach of the statute of limitations under *Miss. Code Ann.* § 11-46-11; (2) failure to accompany plaintiff's complaint with the required certificate of expert consultation under *Miss. Code Ann.* § 11-1-58; and, (3) defendant's absence of liability and other immunities under the Mississippi Tort Claims Act for the allegedly negligent conduct of employees of an independent contractor company. The trial court denied summary judgment on each of these grounds and the denial of these motions was accepted on interlocutory appeal by the Mississippi Supreme Court. Defendant then filed its Brief of Appellant and this responsive brief is in reply to plaintiff's Brief of Appellee.

SUMMARY OF THE ARGUMENT

Mr. Billy L. Pettigrew, deceased, was an elderly resident at the veterans nursing home in Kosciusko, Mississippi, when his family transferred him to the veterans home in Jackson, Mississippi in April 1998, complaining of unhappiness with the management company that operated the Kosciusko facility. (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, pp. 37, 42-43.) Mr. Pettigrew suffered from multiple severe and debilitating health diseases and conditions both before and throughout his residency, and he resided at the Jackson home until his transfer to the hospital for medical treatment on August 8, 2001. Following his transfer from the Jackson veteran's nursing home Mr. Pettigrew remained at the hospital until his death on October 4, 2001.

Plaintiff has filed a lawsuit against the Mississippi State Veteran's Affairs Board ("MSVAB") alleging medical negligence and wrongful death for events which took place during and throughout the residency of Mr. Pettigrew at the Jackson home. (Appellant's R.E. 2.) MSVAB is a governmental entity falling under the protections of the Mississippi Tort Claims Act ("MTCA"). Defendant MSVAB offered three grounds for summary judgment which were denied by the trial court and are the subject of this interlocutory appeal.

(1) Breach of the applicable one-year statute of limitations under *Miss. Code Ann.* § 11-46-11.

The statute of limitations under the MTCA is one year next after the date of allegedly negligent conduct. Plaintiff erroneously based her calculation of the statute of limitations on the date of Mr. Pettigrew's death rather than on the last possible date of allegedly negligent

conduct which occurred several months earlier, thus untimely filing her notice of claim on October 2, 2002, and complaint on April 2, 2003.

Recent case law has clarified that the discovery rule does not apply to actions filed under the MTCA, but even if the discovery rule were applied to the facts of this case, the facts show that plaintiff was aware that she had an alleged potential claim on or about August 8, 2001, which started running of the statute of limitations. Due to his devastated condition Mr. Pettigrew's family had assumed responsibility for his daily affairs prior to his admission to the Jackson veterans home (thus the reason for his placement at the home) and could have brought a negligence suit on his behalf at any time during or within one year next after August 8, 2001, as his surrogate, responsible party, representative, and/or next friend, and no tolling of the statute of limitations took place on the basis of his disability under the MTCA.

(2) Lack of compliance with the mandatory certificate of expert consultation under *Miss. Code Ann.* § 11-1-58.

Plaintiff's complaint was filed on April 2, 2003, which was after the effective date of *Miss. Code Ann.* § 11-1-58, requiring that a certificate of expert consultation accompany a complaint alleging medical negligence where expert support is required. It is undisputed that plaintiff's action required expert proof and that no certificate of expert consultation accompanied their complaint. An action is commenced on the date of filing of the complaint according to the *Mississippi Rules of Civil Procedure*, and thus the requirements of *Miss. Code Ann.* § 11-1-58 applied to this case. Defendant gave notice in its answer and defenses

that plaintiff had failed to state a claim for which relief can be granted and dismissal with prejudice is proper. (Appellant's R.E. 3.)

(3) Defendant lacks vicarious liability for the actions of employees of the independent contractor management company responsible for the care rendered to Billy Pettigrew during his residency at the nursing home.

The care plaintiff asserts was below the standard of care was not performed by employees of MSVAB, but rather was performed by employees of one or both of the independent contractor management companies responsible for the day-to-day operations of the home during his residency. (Two management companies provided the care during Mr. Pettigrew's residency, Affiliated Nursing Homes, Inc., and Diversified Health Services, Inc. ("Diversified"), with Diversified providing said care during the majority of his residency.) (Appellant's R.E. 7, 7-3.)

Under the MTCA, a governmental entity is not liable for the actions of an independent contractor, thus MSVAB has no liability for the actions of the management company employees. Further, the clear contractual language and history of conduct shows that the relationship between MSVAB and the management companies was that of independent contractor where MSVAB did not control the day-to-day operations and where the management companies contractually assumed responsibility for its employees. To the extent that MSVAB was the statutory "governing authority" of the Jackson home, it was immune from liability for its governing decisions under *Miss. Code Ann.* § 11-46-9. Although discovery revealed the full extent of MSVAB's immunity for the employees of the management company through examination of the contracts which were produced to

plaintiff, MSVAB's answer and defenses had put plaintiff on notice that it did not assume responsibility for the conduct of the allegedly negligent care providers. (Appellant R.E. 3.) Plaintiff has no due process right to seek judgment from an improper party lacking legal liability for the alleged negligence, especially where that party would be prejudiced in its defense as defendant MSVAB would be in this case. More importantly, plaintiff had no right of recovery for claims protected under MTCA immunities. Said immunities cannot be procedurally waived thereby circumventing the legislative language and intent and creating a right of action where there was none by law.

There is no genuine issue of material fact that plaintiff filed her notice of claim and complaint after the expiration of the one-year statute of limitations, that she failed to accompany her complaint with the required certificate of expert consultation, and that she sued the wrong party who had no liability for the conduct of the employees who allegedly breached the standard of care. Defendant therefore requests this Honorable Court to review these three grounds for summary judgment *de novo* and to grant summary judgment based on one or all of these grounds.

ARGUMENT

In plaintiff's Brief of Appellee they assert that *Long v. McKinney*, 890 So. 2d 160 (Miss. 2004) represented "proof that for one hundred and eight years our system had not been able to 'identify a sensible pattern of precedent which is both constructive and workable'" regarding the wrongful death statute (Appellee's Brief, p. 1); however, *Long* dealt with who may file a wrongful death action and what claims may be included in that suit without

addressing statute of limitations issues. See *Long* at 183. The Court's ruling in *Long* emphasized its role was not to make the law but to interpret the law. *Long* at 183. The Court's interpretation of the law in *Long* was applied to that case and therefore applied retroactively.

If plaintiff was confused about the statute of limitations question in this wrongful death action, then the reasonable plaintiff would more strictly adhere to the statutory language of the MTCA to avoid negative consequences from said "confusion." (Appellant's Brief, p. 1.) Plaintiff chose to take her chances in this case and rather than timely file her complaint she sat on her rights until the statute of limitations expired.

- A. The Circuit Court incorrectly denied defendant's motion for summary judgment based on the statute of limitations.**
 - 1. Plaintiff's notice of claim pursuant to the MTCA was untimely served and plaintiff's complaint was untimely filed.**

Mr. Pettigrew died on October 4, 2001, approximately two months after his transfer from the MSVAB facility. Plaintiff filed her notice of claim pursuant to the MTCA on October 2, 2002, and filed her complaint on April 2, 2003, alleging medical negligence and wrongful death. Defendant timely answered plaintiff's complaint, putting plaintiff on notice of defendant's affirmative defense of bar of limitations and other defenses under the MTCA. (Appellant's R.E. 2 and 3.)

The statute of limitations under the MTCA is found in *Miss. Code Ann.* § 11-46-11, which requires that "all actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise

actionable conduct on which the liability phase of the action is based, and not after,” providing that a prerequisite notice of claim is filed within this one-year time period. *Miss.*

Code Ann. § 11-46-11(3). The Legislature was clear that:

The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label and other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Miss. Code Ann. § 11-46-11(3).

As in *Long*, the Court has recently clarified that a wrongful death action is a derivative claim and a beneficiary cannot bring a claim for wrongful death where the statute of limitations had expired for the underlying negligence (which would have prevented the decedent from bringing the claim himself.) See *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923 (Miss. 2006), *Wells v. Radiator Specialty Co.*, 413 F. Supp. 2d 778, 782 (S. D. Miss. 2006) and *May v. Pulmosan Safety Equipment Corporation*, 948 So. 2d 483 (Miss. Ct. App. 2007). “Claims - whether for negligence or wrongful death - that were not brought within the statute of limitations are barred by that statute.” *Jenkins* at 926. “A wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly lead to the wrongful death.” *May v. Pulmosan Safety Equipment Corporation*, 948 So. 2d 483, 485 ¶ 8 (Miss. Ct. App. 2007) citing *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926, ¶ 12 (Miss. 2006). “The wrongful

death claim accrues when the claim for the underlying wrongful conduct accrues.” *May* at 485, ¶ 8.

Plaintiff argues in her responsive brief that adherence to the statute of limitations as set forth in these cases should not be applied retroactively because she erroneously relied on earlier case law. (Appellee’s Brief, pp. 2-14.) Plaintiff forgets that the interpretation of the statute of limitations set forth in these cases has already been applied retroactively to these cases and thus she is in effect requesting selectively prospective application of case law, which is not in keeping with legal principles. “Routed in the principles of equality and *stare decisis*, this rule holds that once the Supreme Court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*.” *Gates v. Walker*, 865 F. Supp. 1222, 1234 (S. D. Miss. 1994); citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

Regardless, plaintiff is missing the point that the applicable statute of limitations in this case falls under the strict language of the MTCA. The case most directly on point to this action is *Pounds v. Mississippi Department of Health*, 946 So. 2d 413 (Miss. Ct. App. 2006). As in *Pounds*, defendant MSVAB is a governmental entity and can only be sued in accordance with the MTCA. In *Pounds*, a pregnant woman received some of her medical care at a Mississippi Department of Health facility and thereafter gave birth to a premature infant who died several months later. Noting that the statute of limitations begins to run on the date of “the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based,” under the MTCA the Court in *Pounds* found that the last date

of the allegedly improper prenatal care began the running of the statute of limitations and not the date of the infant's death several months later. *Pounds* at 416, ¶¶ 15-16.

In recent years, the Mississippi Supreme Court has "recognized its duty to apply a strict standard of statutory construction, applying the plain meaning of unambiguous statutes." *Caves v. Yarbrough*, WL 3197504, ¶ 22 (Miss. November 1, 2007) (Unpublished and therefore lacking authority.) (See also *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 853, 583, 590 (Miss. 2006); *Arceo v. Tolliver*, 959 So. 2d 691, 694 (Miss. 2006); *Patello v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (Miss. 2006); *Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583, 591 (Miss. 2006); *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006). In the very recent *Caves*, the Supreme Court described *Miss. Code Ann. § 11-46-11* as setting forth an absolute one year "statute of repose" rather than a statute of limitations which "focuses entirely on the date the negligent act occurred." *Caves* at ¶¶ 12-13. (*Caves* is unpublished and therefore lacking authority at the time of this writing, but is included here for completeness.)

In this action, plaintiff identified no specific dates of allegedly negligent conduct to support her multiple vague allegations; however, the last date on which any "tortious, wrongful or otherwise actionable conduct" could possibly have taken place was August 8, 2001, the date Mr. Pettigrew was transferred from the MSVAB facility. Therefore, under *Miss. Code Ann. § 11-46-11* the statute of limitations (or statute of repose) began to run, at the latest, on August 8, 2001, and expired on August 8, 2002. Plaintiff's notice of claim filed on October 2, 2002, was untimely filed so no tolling took place, thus her complaint filed on

April 2, 2003, was untimely filed. Dismissal is proper for the untimely filing of plaintiff's complaint under *Miss. Code Ann.* § 11-46-11.

2. The discovery rule is not applicable to this case.

Plaintiff asserts incorrectly that the discovery rule tolled the statute of limitations in this case and would toll the statute of limitations until the beneficiaries are aware of their claim. (Appellant's Brief, pp. 14-16.) Plaintiff was aware, or thought she was aware, of the alleged negligence in the care received by Mr. Pettigrew at MSVAB, at the latest, on or about August 8, 2001. Plaintiff Beverly Kraft testified that shortly after that date she contacted her attorney, Jim Kitchens, and they went to the Jackson veterans home to take pictures. She stated, "Something had gone horribly wrong somewhere and I wanted to find out what it was." (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, pp.116-118.) The Supreme Court has made it clear "that the plaintiff's own suspicions regarding possible negligent conduct starts the clock running." *Jackson Clinic for Women v. Henley*, 965 So. 2d 643 (Miss. 2007). Thus applying the logic and law of cases allowing the discovery rule, there is no genuine issue of material fact that the beneficiaries of Mr. Pettigrew were aware (or thought they were aware) that allegedly negligent conduct had taken place on or about August 8, 2001, and that the clock began to run on that date.

Plaintiff's assertion that the discovery rule applies to claims brought under the MTCA has very recently been addressed by the Mississippi Supreme Court in *Caves v. Yarbrough*, WL 3197504 (Miss. Nov. 1, 2007) (Unpublished and therefore without authority, referenced herein for a complete discussion on the issue.) The Court in *Caves* found that as the

legislature had provided no discovery rule in the MTCA, the Court would no longer create and supply one, overruling case law to the contrary. *Caves* at ¶ 32. Thus under the law as set forth in *Caves*, the discovery rule would not apply to this case.

Even if a discovery rule were applied to this case, it is clear that plaintiff acted on her concerns of possible negligence on or about August 8, 2001, and the statute of limitations began to run at that time. Nonetheless, if the Court affirms and publishes the law as set forth in *Caves*, the discovery rule would not apply to this case under the MTCA.

3. The statute of limitations is not tolled by the alleged disability of the decedent.

Mr. Pettigrew was transferred from the Kosciusko home to the Jackson home by his family who had assumed responsibility for his care due to his medical condition. (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, pp. 30-34, 42-43, 119-120.) At the time of his admission to the Jackson home, Mr. Pettigrew suffered from dementia and had experienced at least one stroke, he had a cerebral aneurysm and cancer of the prostate, he was blind, partially paralyzed, unable to walk, required feeding through a tube in his stomach and he was incontinent of bowel and bladder. Based on his long-standing and permanent medical problems, it was anticipated that Mr. Pettigrew's condition would never improve to the point where he could personally manage his daily affairs.

His wife and/or daughter thus assumed the position of "responsible parties" during his residency at the Kosciusko and Jackson veterans homes, admitting him, signing documents on his behalf, and acting as his surrogate and representative throughout his

residencies. Plaintiff Beverly Kraft, Mr. Pettigrew's daughter, even filed a complaint with the Attorney General's Office on Mr. Pettigrew's behalf against the Jackson home during his residency there. (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, 74-79.) Although no power of attorney was established for Mr. Pettigrew nor did the trial court make a legal determination that he was incompetent to handle his daily affairs, there is no genuine issue of material fact that his family had taken control of his affairs due to his devastated condition, which was the reason they placed him in the homes.

Plaintiff erroneously asserts that the savings statute under Miss. Code Ann. § 11-46-11(4) lengthens the statute of limitations so that a disabled person's beneficiaries might file a belated claim. (Appellant's Brief, pp. 16.) After modification on constitutional grounds by *University of Mississippi Medical Center v. Robinson*, 876 So.2d 337, ¶ 19 (Miss. 2004), *Miss. Code Ann. § 11-46-11(4)* states that:

From and after [May 15, 2000], if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

(Any conduct occurring between April, 1998 and May 15, 2000, occurred prior to the effective date of the statute. *Robinson* at ¶ 8, 19.)

Although not applicable to this case, the savings statute for non-MTCA medical malpractice actions where the injured person is of unsound mind includes provisions for the

belated filing of a claim under the savings statute by the “person claiming through him” and by his beneficiaries. *Miss. Code Ann.* § 15-1-36, and § 15-1-55; however, the legislature chose to word the savings statute under the MTCA differently, limiting the benefit to the disabled person. Under *Miss. Code Ann.* § 11-46-11(4), the legislature unambiguously stated that if any person entitled to bring an action be under disability at the time the cause of action accrued, the statute of limitations is tolled so that “he” (the disabled person) may bring the action after “his” disability shall be removed. The legislature did not include a provision under the MTCA for an extension of the statute of limitations for a “person claiming through him” or for the disabled person’s beneficiaries.

Furthermore, in every practical sense, when Mr. Pettigrew’s wife and/or daughter took control of his daily affairs due to his disability and had the power to sue on his behalf, his disability was removed. Under *Miss. Code Ann.* § 15-1-53, if a person who is subject to unsoundness of mind has a guardian or conservator, then an action on his behalf may be brought in the name of that guardian or conservator, without the consideration of any savings clause. *United States Fidelity and Guaranty Company v. Conservatorship of Melson*, 809 So. 2d 647, ¶ 27 (Miss. 2002); citing *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788 (Miss. 1998).

A health care surrogate “shall make a health-care decision in accordance with the patient’s individual instruction, if any, and other wishes to the extent known to the surrogate.” *Miss. Code Ann.* § 41-41-211(6). (Emphasis added.) Several Mississippi cases have upheld the right of surrogates to sign legally binding documents on behalf of the incompetent nursing home resident. See *Covenant Health Rehab of Picayune, LP v. Brown*,

949 So. 2d 732 (Miss. 2007) and *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, 2007 WL 3102141 (N.D. Miss. 2007) (unpublished and therefore lacking authority); *J. P. Morgan Chase & Company v. Conegie*, 492 F.3d 596 5th Cir. (2007). It stands to reason that initiation of a suit for alleged failure to provide proper health-care (like initiation of a complaint with the Attorney General's Office or the filing of a medical malpractice lawsuit) that could remedy a patient's health-related loss would fall within the category of a surrogate's health-care decision or "other wish".

When Mr. Pettigrew's family took control of his personal and medical affairs, placed him in the veterans homes, and filed another claim on his behalf with the Attorney General's Office, they became his responsible parties, surrogates, and representatives. Therefore in every meaningful sense, his disability was removed. See *Miss. Code Ann.* § 41-41-211, *Miss. Code Ann.* § 15-1-53. Mr. Pettigrew's wife and/or children were aware that if a medical negligence suit were to be filed so that he might benefit from any resulting settlement or judgment during his lifetime, they were the parties responsible for filing it. They chose not to do so, and may not justly claim a tolling of the statute of limitations after his death owing to his disability so that they might file their wrongful death action.

B. Plaintiff's suit should be dismissed with prejudice for failure to attach the certificate of expert consultation.

1. *Miss. Code Ann.* § 11-1-58 was in effect at the time that plaintiff commenced this claim.

The Legislature required that a certificate of expert consultation must accompany a plaintiff's complaint in a medical negligence action where expert testimony is required

effective from and after January 1, 2003. The plain language of *Miss. Code Ann.* § 11-1-58 requires that , “the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff” (Emphasis added.) It is undisputed that plaintiff did not accompany her complaint with this required certificate of expert consultation.

Plaintiff’s assertion that an action is “commenced” by the filing of the notice of claim is without authority. (Appellant’s Brief, p. 17.) *Miss. R. Civ. P.* 3(a) is clear that “a civil action is commenced by filing a complaint with the court.” (Emphasis added.) Thus, plaintiff’s complaint, which was filed on April 2, 2003, was clearly filed after January 1, 2003, and required an accompanying certificate of expert consultation. As this certificate was omitted from plaintiff’s complaint, dismissal was proper.

2. Defendant did not waive this defense.

Defendant’s answer included an affirmative defense of plaintiff’s failure to state a claim for which relief can be granted, which the Court has found sufficient to give notice of a defense under *Miss. Code Ann.* § 11-1-58. *Walker v. Whitfield Nursing Center*, 931 So. 2d 583, 591-592 (Miss. 2006). Defendant’s motion for summary judgment on this issue was filed more than a year before case law interpretation of the statute, during the discovery phase of litigation and well before trial; thus plaintiff is not prejudiced by the timing of the motion for summary judgment. The Court has interpreted that strict compliance with *Miss. Code Ann.* § 11-1-58 is required. *Walker* at 588-590. Therefore, this defense is not waived and dismissal is proper for plaintiff’s failure to strictly comply with this statute.

3. Dismissal without prejudice is appropriate.

Plaintiff asserts that if dismissal is appropriate for her failure to comply with *Miss. Code Ann.* § 11-1-58, then this dismissal should be without prejudice. (Appellant's Brief, p. 18-22.) Although case law has varied on this issue, the most applicable case is *Walker* where litigation was in progress and dismissal was with prejudice. *Walker* at 585. Also, as the statute of limitations has been breached in this case, dismissal with prejudice is proper.

Plaintiff's plea that she be exempted from the requirements of *Miss. Code Ann.* § 11-1-58 because of the health problems of attorney Walter W. Thompson is without merit. Plaintiff's notice of claim was filed by attorney James Kitchens and plaintiff's complaint was signed and filed not by Mr. Thompson, but by attorney Margaret Ellis, with attorney Jeffrey Ellis also listed on the complaint. One or all of these attorneys had a responsibility to make sure the complaint was accompanied by the required certificate of expert consultation but did not do so.

C. The Mississippi State Veterans Affairs Board was improperly sued as a party in this action.

1. MSVAB was not responsible for the actions of its independent contractor's employees.

MSVAB consists of seven members who are honorably discharged veterans appointed by the Governor of Mississippi. *Miss. Code Ann.* § 35-1-1. MSVAB is designated as the statutory "governing authority" of the veterans' homes and as such has the responsibility to create and operate the homes as authorized by law (either contracting with a non-governmental entity or with the United States Department of Veterans Affairs to enact

said operation or take responsibility for said operation itself), require compliance with United States Department of Veterans Affairs standards, set standards for admission and dismissal, promulgate rules and regulations, and handle the funding for staffing and equipment purchases. *Miss. Code Ann.* § 35-1-7; § 35-1-19 through § 35-1-29.

During the early part of Mr. Pettigrew's residency at the Jackson home, MSVAB had contracted with Affiliated Nursing Homes, Inc., and then with Diversified Health Services ("Diversified") to manage and operate the home. MSVAB again contracted for the management and operation of the Jackson home with Diversified for the time period between July 1, 1999, until after Mr. Pettigrew's transfer/discharge (the time period most relevant to this case). (Appellant's R.E. 7, 7-3.) This contract expressly sets forth the following:

"The Contractor shall, at all times, be regarded as an independent Contractor and shall, at no time, act as an agent for the State." (Appellant's R.E. 7, 7-3, p. 2.)

"Contractor's personnel shall not be deemed in any way, directly or indirectly, expressly or by implication, to be employees of the State." (Appellant's R.E. 7, 7-3, p. 2)

"The Contractor shall be legally considered an independent Contractor and neither the Contractor nor its employees shall, under any circumstances, be considered servants or agents of the SVAB; and the SVAB shall be at no time legally responsible for any negligence or other wrongdoing by the Contractor, its servants, or agents." (Appellant's R.E. 7, 7-3, p.2.)

“Nothing in this agreement shall be interpreted as excluding or limiting any tort liability of the Contractor for harm caused by the intentional or reckless conduct of the Contractor or for damages incurred through the negligent performance of duties by the Contractor.” (Appellant’s R.E. 7, 7-3, p. 7.)

In addition to the above contractual agreement, Diversified also agreed to purchase Comprehensive General Liability Insurance and Professional Liability Insurance. (Appellant’s R.E. 7, 7-3, p. 15.) Thus the contract between MSVAB and Diversified expressly placed responsibility and liability for the conduct of Diversified’s employees and the day-to-day care of the residents with Diversified.

Despite the clear language of the contract, plaintiff asserts that MSVAB retained control of the Jackson home because it was “directly answerable” to the Mississippi PEER Committee as the homes’ “governing authority”, offering a PEER review and response as exhibits. (Appellant’s Brief, pp. 22-23.) Defendant respectfully asserts that said exhibit deals primarily with funding and other financial issues and does not address responsibility for the day-to-day care of the residents. In fact, the report specifies that “[t]he Veterans Affairs Board contracts with management company, Diversified Health Services, to handle day-to-day management of the homes in Jackson, Oxford, and Kosciusko. VAB has directly operated the Collins veterans home since July 2000.” (Appellee’s R.E., p. 2, 3.)

2. MSVAB did not have control of the day-to-day operations of the nursing home.

Without authority or factual support, plaintiff asserts that MSVAB retained responsibility and control of the daily operation of the Jackson home during the time that Mr.

Pettigrew was a resident. Mr. Adrian Grice, Executive Director of MSVAB, testified that during the applicable time period the Jackson nursing home was “managed by contractors, and they oversaw the care of patients,” including their “day-to-day care.” (Appellee’s R.E. 4, p. 7.) He also testified that the employees for the contractor answered directly to the management company and the Board, by its contract, monitored the terms of the contract. (Appellee’s R.E. 4, pp. 9, 27.)

Plaintiff mistakenly asserts that because MSVAB employees were the final two names on a list of complaint contact persons for residents and families, it retained control. (Appellee’s R.E. 5.) They forget that the first seven names on the list were Diversified employees and, according to Mr. Grice, the director of MSVAB (the final name on the list) would have logically relayed the complaint to the administrator of the home, a Diversified employee. (Appellee’s R.E. 4, p. 14.) While this list may indicate peripheral involvement in complaint issues, it did not indicate that MSVAB went beyond the contractual agreement to, in fact, manage and operate the day-to-day activities in the Jackson home.

Plaintiff’s suggestion that because MSVAB handled the billing for the Jackson home it maintained control of the day-to-day operations is likewise misguided. (Appellee’s R.E. 6.) Per its contract with Diversified, MSVAB prepared all invoices and reports due to be submitted to the U.S. Department of Veteran’s Affairs. Ms. Kraft explained that Mr. Pettigrew received money from the VA and this money was in turn used to pay his veterans home bill. Diversified then billed MSVAB on a monthly basis for the nursing and other direct care services it provided. (C. P. Supreme Court Supplement Record, deposition of

Beverly Pettigrew Kraft, pp. 35-36, and Appellant's R.E. 7, 7-3.) MSVAB thus simply managed the financial aspects of the homes, in the process paying Diversified as an independent contractor for its services in operating the home.

Plaintiff suggests also that documents addressing violations found by the Mississippi State Department of Health proved that MSVAB maintained control of the day-to-day care received at the Jackson home. Plaintiff is mistaken, as Diversified had the responsibility to operate the homes in accordance with legal requirements and correct violations per its contract. (Appellant's R.E. 7, 7-3, p. 12; Appellee's R.E. 7.)

MSVAB is a governmental entity falling under the protections of the MTCA. Diversified was a non-governmental business whose corporate office was in Memphis, Tennessee. Plaintiff's assertion that Diversified was akin to the University of Mississippi Medical Center's ("UMMC") practice groups which were created by UMMC as instrumentalities of the state is mistaken. *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

The MTCA provides the exclusive civil remedy against a governmental entity such as the MSVAB. *Howard v. City of Biloxi*, 943 So. 2d 751 ¶ 5 (Miss. Ct. App. 2006). A governmental entity is not liable for the conduct of independent contractors. *Miss. Code Ann.* § 11-46-1(f), *Miss. Code Ann.* § 11-46-7(2); *Miss. Code Ann.* § 11-46-5(1). "The Mississippi legislature has determined that governmental entities and their employees shall be exempted from liability in certain situations as outlined in *Miss. Code Ann.* § 11-46-9." *Hodges v. Madison County Medical Center*, 929 So. 2d 381 ¶ 6 (Miss. Ct. App. 2006); see also *Estate of Williams v. City of Jackson*, 844 So. 2d 1161, ¶ 9 (Miss. 2003); *Fair v.*

Town of Friars Point, 930 So. 2d 467, ¶ 9 (Miss. Ct. App., 2006). “If any subpart of Mississippi Code Annotated §11-46-9(1) applies, immunity exists.” *Fair* at ¶ 9; see also *Delmont v. Harrison County School District*, 944 So. 2d 131, ¶ 7 (Miss. Ct. App. 2006).

“The exemption under § 11-46-9, “is an entitlement not to stand trial rather than a mere defense to liability and, therefore, should be resolved at the earliest possible stage of litigation.” *Hodges* at ¶ 6. “[I]mmunity is a question of law and is a proper matter for summary judgment under Rule 56 of *Mississippi Rules of Civil Procedure*.” *Hodges* at ¶ 6. “Due to the public interest in protecting governmental officials and entities from the costs associated with defending civil lawsuits, summary judgment is especially applicable when governmental or official immunity is in issue.” *Williams v. Lee County Sheriff's Department*, 744 So. 2d 286, 291 (Miss. 1991).

In its role as “governing authority” of the veterans homes, the governing decisions of MSVAB are immune from liability under *Miss. Code Ann.* § 11-46-9 as follows:

Miss. Code Ann. § 11-46-9(1)(a) - arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

Miss. Code Ann. § 11-46-9(1)(d) - based on the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of the governmental entity or employee thereof, whether or not the discretion be abused;

Miss. Code Ann. § 11-46-9(1)(e) - arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

Miss. Code Ann. § 11-46-9(1)(g) - arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel, and in general, the provision of adequate governmental services;

Miss. Code Ann. § 11-46-9(1)(r) - arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities.

By the unambiguous contractual language, MSVAB has no liability for the conduct of the day-to-day care providers who were employees of the independent contractor Diversified. Under the facts of this case, MSVAB did not step beyond the contractual language and take control of the day-to-day operation of the Jackson home. To the extent that MSVAB functioned as the “governing authority” of the homes, MSVAB is immune for said governing decisions and functions under the MTCA.

3. MSVAB Has Not Waived This Defense and is Not Estopped From Raising This Issue.

Plaintiff mistakenly asserts that MSVAB failed to raise the issues in this grounds for summary judgment in its initial pleading. (Appellant’s brief, p. 28-32.) Although discovery had not yet revealed the extent of MSVAB’s immunity from liability as an improper and/or immune defendant, MSVAB’s answer and defenses put plaintiff on notice that it owed plaintiff no legal duty and caused plaintiff no damages, that plaintiff failed to state a claim for which relief can be granted, that the injuries complained of resulted from the acts or

omissions of persons or entities other than this defendant or that plaintiff's injuries were caused by intervening, superceding events, and that all rights and defenses pursuant to the MTCA applied. (Appellant's R.E. 3, first, second, third, fifth, and thirteenth defenses.)

Specifically, MSVAB denied that it was vicariously liable for the acts and omissions of the employees which caused or contributed to plaintiff's injuries. (Appellant's R.E. 3, p.10.) While MSVAB admitted providing care, treatment and services to Mr. Pettigrew (which it did per the contract, providing physician, pharmacy and other specialized services), defendant at no time admitted that all of the care, treatment and services provided to Ms. Pettigrew was provided by MSVAB (in particular, discovery revealed that MSVAB did not provide the day-to-day care complained to have been negligent in this action). (Appellant's R.E. 2 and Appellant's R.E. 3, p. 63.) Defendants also denied that the care of Mr. Pettigrew was under the exclusive control of defendant. (Appellant's Reply R.E. 3, p. 78.) Thus it is clear that defendant's answer was adequate to put plaintiff on notice that MSVAB had no liability for the allegedly negligent conduct.

Plaintiff also complains that MSVAB waived the assertion that it was an improper party to this action without authority that said defense can be waived. Discovery revealed the existence and content of the management company contracts and defendant's motion for summary judgment was filed long before trial. Unlike a procedural error that may possibly be waived if not timely asserted, plaintiff's error is substantive and goes to the heart of defendant's rights under the judicial system.

Plaintiff was aware before and during the course of this litigation that a management company operated the MSVAB facility at or about the time of Mr. Pettigrew's admission to the Jackson home and this management company was the source of the problem with Mr. Pettigrew's care. (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, pp. 37, 42, 45-48.) In fact, plaintiff Beverly Kraft mistakenly believed that the management company had been named in this action. (C. P. Supreme Court Supplement Record, deposition of Beverly Pettigrew Kraft, pp. 45-48.) Plaintiff at no time sought to amend her complaint to add the proper defendant(s) and should not wonder that the improper one they sued should seek dismissal.

Under plaintiff's unjust scheme, they should be allowed to seek redress from an improper party because this improper party is the one they mistakenly sued. If dismissal is denied, MSVAB will be placed in a prejudicial position- attempting to justify and defend the alleged misdeeds of another to its own detriment while potentially lacking important information in the management company's possession. Thus requiring MSVAB to stand trial for the acts/omissions of another denies defendant due process of law and causes impermissible prejudice to its own defense.

MSVAB enjoys sovereign immunity except through the MTCA, which waives immunity for the allegedly negligent conduct of its employees during the course and scope of their employment. The MTCA is clear that a governmental entity is not liable for the conduct of its independent contractors. In this case there is no genuine issue of material fact that the employees who provided the allegedly negligent care to Mr. Pettigrew were not

employees of defendant MSVAB and by contract MSVAB held no responsibility for their conduct. Further, MSVAB is immune from liability for its discretionary and otherwise immune "governing authority" decisions under the MTCA. Where, as here, sovereign immunity applies and no right of action exists, none can be created by waiver.

CONCLUSION

There is no genuine issue of material fact that plaintiff's complaint was untimely filed after the statute of limitations had expired and thus dismissal is proper. There is likewise no genuine issue of material fact that plaintiff's complaint was not accompanied by a certificate of expert consultation and thus dismissal is likewise proper. There is no genuine issue of material fact that MSVAB is not liable by contract, conduct, nor under the MTCA for the alleged negligence of employees of its independent contractors. Finally, there is no genuine issue of material fact that MSVAB is immune from liability for its "governing" decisions under the MTCA, thus dismissal is proper. For any or all of these grounds for summary judgment, defendant MSVAB respectfully requests this Honorable Court to dismiss it from plaintiff's action, with prejudice.

THIS, the 19th day of December, 2007.

Respectfully submitted,

MISSISSIPPI STATE VETERANS AFFAIRS
BOARD

WILKINS, STEPHENS & TIPTON, P.A.

BY: Melanie H. Morano
Senith C. Tipton (MSB [REDACTED])
Faye Murphree James (MSB [REDACTED])
Melanie H. Morano (MSB No [REDACTED])

WILKINS, STEPHENS & TIPTON, P.A.
One LeFleur's Square
4735 Old Canton Road
Post Office Box 13429
Jackson, Mississippi 39236-3429
Phone: 601-366-4343
Fax: 601-981-7608

CERTIFICATE OF SERVICE

I do hereby certify that I have caused to be hand delivered a true and correct copy of the above and foregoing *Appellant's Reply Brief* to the following:

Hon. Tomie T. Green
Circuit Judge, Hinds County
Post Office Box 327
Jackson, Mississippi 39205-0357

James W. Kitchens, Esq.
Margaret P. Ellis, Esq.
Kitchens & Ellis
610 North Street
Jackson, Mississippi 39202-3116
Attorneys for Plaintiffs

THIS, the 19th day of December, 2007.

Melanie H. Morano
Senith C. Tipton (MSB No. [REDACTED])
Faye Murphree James (MSB No. [REDACTED])
Melanie H. Morano (MSB No. [REDACTED])